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Supreme Court, U.S.
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No. 92-2009

In The

# Supreme Court of the United States

October Term, 1993

STATE OF MISSOURI,

*Petitioner,*

v.

SAMUEL LEVI ERWIN,

*Respondent.*

**On Petition For Writ of Certiorari to the Missouri Supreme Court**

## RESPONDENT'S BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that only one issue is raised in this Petition and that the Missouri Supreme Court has artfully phrased it as follows:

> Whether the instruction on defendant's intoxication, patterned after MAI-CR3d 310.50 ["You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct."], violates the defendant's right to due process of law because the instruction effectively creates a presumption that an intoxicated person has the requisite mental state, relieving the state of its constitutional burden of proving all elements of the offense beyond a reasonable doubt.

*State v. Erwin*, 848 S.W.2d 467, 481 (Mo. banc 1993).

The other questions presented by Petitioner are ancillary to this issue and lack independent federal standing. Respondent addresses them nonetheless.

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## FACTS OF THE CRIME – RESTATED

Although Petitioner has set forth its own view of the case, both the Missouri Supreme Court and the Missouri Court of Appeals, Western District, objectively found the facts to be as follows:

Defendant Levi Erwin killed Aaron Cochran with a shotgun blast to the head as Aaron lay sleeping on his bed at 3:30 or 4:00 o'clock on a Saturday morning, August 20, 1988. Aaron was 17 years old. Levi, also 17, was an overnight guest in Aaron's house. The evidence shows nothing of any motive for the killing. Levi and Aaron were friends. Levi said, in a later videotaped statement made to sheriff's deputies, "[W]e were just like brothers."

The only account of the events surrounding the killing comes from Levi's own statements to the sheriff's deputies, made later in the day of the killing and on the day following. A videotape of his statement made to the officers on the second day after the killing was shown to the jury at the trial, and the jury members were furnished with transcripts thereof.

Aaron lived with his parents and two brothers in their rural home. The parents and the brothers were absent from home on this night, and Levi's overnight stay was prearranged between himself and Aaron. The two youths were not together during Friday evening, but each was engaged in other activities with other friends. Levi was driven by a friend to the Cochran house and dropped off there at about 12:35 a.m. Aaron had not yet arrived home. He got home about 1:00 a.m.

Aaron had brought home with him a small keg of "Matilda Bay," which the evidence describes as a wine cooler, and a six-pack of beer. After Aaron got home, the two boys watched "The Three Stooges" on television, then watched a videotaped Vietnam movie, "Purple Hearts." Levi later told the police officers that the movie excited him. Both Levi and Aaron were involved in a paramilitary group called "Atherton Defense Group."

Aaron and Levi drank the Matilda Bay and five cans of the beer – the sixth had been broken – as they watched the movie. Levi himself drank three glasses of Matilda Bay, but he did not say how much beer. At about 3:15 a.m., Aaron went upstairs to bed. He had difficulty climbing the stairs. After his death, his blood alcohol was found to be .05 percent. One tenth of one percent (.10 percent) blood alcohol content would indicate intoxication.

After Aaron had gone to bed, Levi went to the basement of the house to get a gun to take with him on a nocturnal quadrunner ride "because I thought maybe I would see a wolf or something out there." In the basement he shot off some rounds with a 12-guage pump action shotgun. (The sheriff's deputies, when they came to the house later, found the walls and the ceiling of the basement had been shot into. The water pipes in the basement had been damaged by shot so that the basement was flooded.) Levi then apparently took the shotgun upstairs and shot Aaron, who was asleep on his bed. From the massive head wound and other evidence, witnesses concluded there was a second shot. In his later statement Levi said, "I don't really know, but I'm not saying it for a fact, but I can picture myself shooting

Aaron in his room." Asked if he considered this person that was lying on the bed to be Aaron, he answered, "No. I never thought about it until afterwards." He estimated the time of the shooting at 3:30 or 4:00 o'clock in the morning.

Levi, after the shooting, dropped the shotgun and ran outside. He drove across a plowed field in a station wagon and got the station wagon stuck. He returned to the Cochran house and fell asleep in the cab of a grain truck. When he awakened in the morning, he vaguely remembered shooting in the basement. He went into the house. He went upstairs and realized he had shot Aaron. He got the shotgun from Aaron's room. He returned a second time to Aaron's room. "I remember looking at Aaron's body again to hope that it was a nightmare or something, and it wasn't."

Levi attempted to call his parents but found the phone was dead. Officers later discovered the phone wire had been severed by one of the shotgun blasts in the basement of the house. He walked to the nearby house of one Carl Martin. There was no one home. He took a truck and drove to his own home in Independence, a distance, we surmise, of 10 or 12 miles, where he lived with his mother and father. He gave his mother and father a confused and hysterical account of the event described above. The father called the sheriff's office. Sheriff's deputies repaired to the Cochran house. There they found the gruesome scene, which can be imagined from what had transpired there.

## REASONS FOR DENYING THE WRIT

### I. THE MISSOURI SUPREME COURT DID NOT ERR IN FINDING THAT THE MISSOURI APPROVED INSTRUCTION STATING THAT "VOLUNTARY INTOXICATION WILL NOT RELIEVE A PERSON OF RESPONSIBILITY FOR HIS CONDUCT" VIOLATES DUE PROCESS PURSUANT TO THIS COURT'S DECISION IN *SANDSTROM V. MONTANA*

This case presents no new question of law. The sole issue before the Court is whether an instruction, which says "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct," violates the due process clause of the Fourteenth Amendment by creating a presumption which alleviates the government's burden of proving each element of a crime beyond any reasonable doubt. Although petitioner insists that the instruction at bar is merely a restatement of proper Missouri law regarding voluntary intoxication, it is patently obvious, and the Missouri Supreme Court found, that the instruction "creates a reasonable likelihood that the jury would believe that if defendant was intoxicated, he was criminally responsible (for his conduct) regardless of his state of mind," thereby unconstitutionally relieving the state of its burden of proof in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). *State v. Erwin*, 848 S.W.2d 476, 483 (Mo. banc 1993).

### A. THE MISSOURI APPROVED INSTRUCTION ON VOLUNTARY INTOXICATION CONTAINS A MANDATORY/CONCLUSIVE PRESUMPTION IN VIOLATION OF *SANDSTROM V. MONTANA*

It does not stretch the imagination to envision the likelihood that the jury in this case interpreted the instruction "that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct" as a mandatory presumption. Similar to the instruction at issue in *Sandstrom* ("[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 515), there is a reasonable likelihood that the jury in respondent's trial may have interpreted the instruction to mean that "a person is criminally responsible for his conduct even absent intent." In other words, being voluntarily intoxicated makes one *strictly liable* for any and all ensuing conduct.

Indeed, the Missouri Supreme Court noted petitioner's claim in oral argument that "voluntary intoxication stands in the place of intent," which is reasoning completely consistent with strict liability but totally contrary to Missouri law. *Erwin*, 848 S.W.2d at 483. This constitutional defect is particularly fatal in a case such as respondent's, where although the act of killing was admitted, there was considerable dispute as to respondent's intent and mental state at the time. Under the Missouri instruction, the jury may have reasonably presumed that respondent possessed that state of mind which makes him most "responsible" for the death of the victim "knowingly" killed. This presumption obliterates

the obligation to prove the mental state of the accused *beyond a reasonable doubt*.

### B. BURDEN – SHIFTING PRESUMPTION

A state must prove every element of an offense beyond a reasonable doubt, and may not shift the burden of proof to respondent by means of an instruction containing a rebuttable presumption. *Sandstrom*, 442 U.S. at 524, *discussing Patterson v. New York*, 432 U.S. 197, 215 (1977). It is quite reasonable that the jury may have believed the commanding language of the instruction ("will not relieve") to mean that if respondent is found to be intoxicated, then he is presumed responsible for his conduct regardless of specific intent, a presumption that respondent must then disprove. It was not error to find that the state would be relieved of its burden of proof beyond a reasonable doubt with respect to an element of the crime and be in violation of due process under *Sandstrom*.

## II. THE MISSOURI SUPREME COURT WAS CORRECT IN ITS APPLICATION OF *BOYDE V. CALIFORNIA*.

Although "a single instruction to a jury may be judged in artificial isolation, . . . this does not mean that an instruction by itself may never rise to the level of constitutional error," especially if the instruction is capable of misinterpretation. *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). Simply because other proper instructions were given does not necessarily mean that the inference is cured of its likely effect. The test is "whether there is a

reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

There was undisputed evidence of respondent's voluntary intoxication before the jury during his trial. The Missouri Supreme Court noted that, unlike the other *general* instructions discussing the presumption of innocence and burden of proof, the voluntary intoxication instruction is a *specific directive* to the jury on particular evidence before them, the defendant's voluntary intoxication:

> Other instructions were given which correctly gave defendant a presumption of innocence and placed the burden of proof on the state as to all elements of the crime of second degree murder including whether defendant acted knowingly. However, an instruction relating to specific evidence which may be read to relieve the state of its burden of proof as to a mental state is not cured by another general instruction placing the burden on the state. The two instructions are contradictory. A jury is as likely as not to resolve the contradiction favorably to the state. That likelihood requires the court to grant relief. *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

848 S.W.2d at 483 n.4.

The voluntary intoxication instruction is also given to the jury after all of the general instructions, *see* MAI-CR3d, making it all the more likely that the jury will consider it a modification of the previously given general instructions for a case involving a voluntarily intoxicated

defendant. Even the petitioner's counsel apparently thought in this manner, arguing to the Missouri Supreme Court that "voluntary intoxication stands in the place of intent" under Missouri law. 848 S.W.2d at 483. As the Court pointed out, if learned counsel for the State could not figure out which instruction was correct, it is unlikely a jury of nonlawyers would be able to do so. *Id.*

## III. THE MISSOURI SUPREME COURT DID NOT ERR IN THE SCOPE AND APPLICATION OF ITS HOLDING

The Missouri Supreme Court, in following the *Sandstrom* decision, "has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . " *Yates v. Aiken*, 484 U.S. 211, 216 (1986), *quoting Desist v. United States*, 394 U.S. 244, 263-264 (1969). The court is not stating a new rule of constitutional law. However, petitioner concludes, with no support other than attenuated reasoning, that in finding a mandatory presumption in violation of *Sandstrom* the court is precluded from "limit[ing] (its holding) to pending or future cases." Brief for Petitioner, 16. The lower court's pronouncement of the scope of its decision is not an issue of any relevance to respondent's case, and despite petitioner's unarticulated premise for why this issue requires the Court's attention, the scope and application of the lower court's decision remains proper under review.

For support, petitioner cites *Lee v. Missouri*, 439 U.S. 461 (1979), and *Allen v. Hardy*, 478 U.S. 244 (1986), which

both deal with the application of laws retroactively. However, respondent's case does not present a similar situation in which a recent Supreme Court decision may or may not impact favorably on a respondent if the case were reconsidered in light of that Supreme Court decision.

"[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *United States v. Johnson*, 457 U.S. 537, 549 (1982).

Petitioner admits that the decision in *Erwin* is not a new principle of constitutional law, and it should not be applied retroactively. Petitioner's concern that potential claims will be stifled by non-retroactive application is feigned at best. In the interest of justice the lower court did not err in limiting the *Erwin* decision to cases now pending and in the future.

## CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the Missouri Supreme Court should be denied.

Respectfully submitted,

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